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No. 90-1688

In The

Supreme Court of the United States

October Term, 1990

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY and POTOMAC GREENS ASSOCIATES PARTNERSHIP,

Petitioners,

v.

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF IN OPPOSITION BY RESPONDENTS DAINGERFIELD ISLAND PROTECTIVE SOCIETY, KENNETH WILLIAMS, ELLEN PICKERING, JEAN CALDWELL, SAVE THE GEORGE WASHINGTON PARKWAY, AND NORTHEAST CITIZENS ASSOCIATION

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QUESTION PRESENTED

Whether, in finding that this suit is not barred by laches because there was no undue prejudice to defendants from the delay, the Court of Appeals appropriately considered the traditional factors – expenditure of funds and the degree of construction completed.

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Respondents, Daingerfield Island Protective Society, Kenneth Williams, Ellen Pickering, Jean Caldwell, Save the George Washington Parkway, and Northeast Citizens Association respectfully request this Court to deny the petition for a writ of certiorari to review the judgment of

the United States Court of Appeals for the District of Columbia Circuit. That opinion is reported at 920 F.2d 32.

STATEMENT OF THE CASE

In 1970, the National Park Service agreed to exchange an easement on the Mount Vernon Memorial Parkway[1] south of National Airport for Dyke Marsh, a 28 acre wetland further south along the Potomac River owned by developer Charles Fairchild & Co. The easement was to enable Fairchild to construct a traffic interchange providing access from the Parkway to the adjacent Potomac Greens site, where he planned a mammoth, Crystal City-like development. According to a draft Environmental Impact Statement prepared by the Park Service, the traffic interchange and the Potomac Greens development would create "gridlock" on the Parkway and extend rush hour by several hours.

Although Fairchild conveyed Dyke Marsh to the Park Service in 1971, the Park Service did not immediately convey the easement. An acrimonious dispute between Fairchild and the Park Service over the design of the interchange caused the delay. The dispute became so heated that in 1982 Fairchild unsuccessfully sued the Park

[1] The Mount Vernon Memorial Parkway was created by Congress as the first parkway and the first memorial road in the Nation. Its purpose was to provide an appropriate sylvan setting for the ride from Washington to Mount Vernon. The Parkway was listed on the National Register of Historic Places in 1981. The National Park Service has historically opposed increased access to the Parkway.

Service to invalidate the land exchange for lack of consideration.[2] Thereafter, current petitioner Richmond, Fredericksburg & Potomac Railroad Company (RF&P) succeeded to Fairchild's rights because Fairchild had not diligently pursued development.

The easement was finally transferred in 1984. Two years later, respondents filed suit seeking a declaration that the Park Service had no authority to make the exchange.[3] The District Court dismissed the claim for laches, finding both an unreasonable delay in bringing suit and prejudice. *Daingerfield Island Protective Society v. Hodel*, 710 F.Supp. 368 (D.D.C. 1989).

The Court of Appeals for the District of Columbia Circuit reversed because it could find no undue prejudice. *Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32 (D.C. Cir. 1990). The Court of Appeals found that neither the defendants' limited expenditures[4] nor the

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[2] In dismissing Fairchild's claim, Judge Bryan attributed the lack of development to the delay caused by Fairchild. *See* 710 F.Supp. at 372.

[3] The suit also challenged several other agency decisions related to the traffic interchange under various Federal statutes. A claim under the National Environmental Policy Act became moot after Congress enacted a law requiring an environmental impact statement. The other claims remain pending after the Court of Appeals, in a portion of its ruling not before this Court, overruled the District Court's dismissal of these claims as moot.

[4] "Documented expenditures" were less than $692,000 out of the estimated cost of $500 million, and not even all of this was in the pertinent period. The National Park Service submitted no documented expenses. 920 F.2d at 38 and n.8.

degree of construction of the interchange and the Potomac Greens project constituted undue prejudice. 920 F.2d at 39.

After the Court of Appeals denied rehearing, the petition for a writ of certiorari was filed.[5]

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS

The Court of Appeals applied the laches doctrine in a traditional manner consistent with its sister courts. Courts of Appeals have uniformly held that laches applies only where (1) plaintiffs have inexcusably delayed filing suit, and (2) the delay has unduly prejudiced defendants. Contrary to RF&P's claim, Pet. at 6, the Court of Appeals did not "recognize the prejudice to the Intervenors resulting from the delay. . . . " *See* 920 F.2d at 38-39. Rather, the Court examined all traditional criteria for determining whether delay caused undue prejudice – expenditure of funds or other resources, disappearance of witnesses or other evidence, amount of construction completed – and concluded that these were entirely missing or insufficient in this case to constitute undue prejudice. As part of this analysis, the Court of Appeals did precisely what other Circuits previously have done. It examined the amount of completed construction to determine if effective relief were still available. 920 F.2d at 40.

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[5] *See* Petition for Writ of Certiorari (May 3, 1991), hereafter "Pet."

Indeed, the very decisions cited by RF&P as in conflict with the ruling below performed the same analysis. For example, the Tenth Circuit in *Park County Resource Council, Inc. v. United States Dep't of Agriculture*, 817 F.2d 609 (10th Cir. 1987), noted that ascertaining prejudice under the laches doctrine in environmental cases turns upon 1) the percentage of total costs already committed, and "more important[ly]," 2) whether "the project is so substantially completed that significant environmental effects are irreversible. . . . " *Id.* at 618.

The Eighth Circuit implicitly used the same criteria in *Citizens and Landowners Against the Miles City/New Underwood Powerline v. United States Dep't of Energy*, 683 F.2d 1171 (8th Cir. 1982). Recognizing that laches is not favored in environmental cases, the Court of Appeals still found sufficient prejudice because the contested powerline, which plaintiffs wanted rerouted, was complete and in operation. *Id.* at 1175, 1177.

Other circuits have also found the disputed project's degree of completion important to the laches analysis in environmental cases, including: the Fifth, *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers*, 549 F.2d 1021, 1028 (5th Cir. 1977), *cert. denied*, 434 U.S. 836 (1977) ("[i]n assessing the degree of prejudice to the defendants . . . [the court must] balance the equities, considering both the expenditures which have been made by the defendants and the environmental benefits which might result if the plaintiffs are allowed to proceed. . . . "); the Third, *Shiffler v. Schlesinger*, 548 F.2d 96, 104 (3d Cir. 1977) (finding prejudice when project was 85-90% complete when suit was filed; "as long as some environmental harm can still be ameliorated, compliance with NEPA will

generally be ordered"); and the Ninth, *City of Davis v. Coleman*, 521 F.2d 661, 670 n.11, 678 (9th Cir. 1975) (finding laches inappropriate in environmental case where project was only 50% completed; plaintiff "will not be the only victim of possible environmental damage").[6]

RF&P would fabricate a conflict by distorting the Court of Appeals decision. The court did not rule that an unreasonable delay will not invoke laches "regardless of the harm caused by the delay, if the objectives . . . sought continued to be achievable." Pet. at 2. The distortion has enabled RF&P to pose a question not at issue below or here – whether, under laches doctrine, it is appropriate to ignore "the occurrence of harm done defendant by plaintiff's unreasonable, unexcused delay." Pet. at i.

In fact, as we have shown, the Court of Appeals applied traditional laches doctrine, which requires defendant to show *both* inexcusable delay and undue prejudice. After finding no reasonable excuse for the delay, 920 F.2d at 38-39, the Court of Appeals examined whether defendants had been unduly prejudiced. The Court noted and agreed with the District Court's finding that "appellees' expenditures and the extremely limited development so

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[6] The third and final case cited by RF&P, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), cert. denied, ___ U.S.L. Wk. ___ (June 28, 1991), involved a Voting Rights Act claim rather than environmental issues. Even so, the laches doctrine outlined by the Fourth Circuit in that case does not conflict with the District of Columbia Court of Appeals decision. The Fourth Circuit found sufficient prejudice for application of the laches bar and no effective way to give plaintiffs relief. Granting plaintiffs' requested reapportionment based on the 1980 census would be "completely gratuitous" since the next county election was scheduled to follow the 1990 census. *Id.* at 104.

far carried out would not, taken together, 'rise to the requisite level of prejudice that would justify application of the laches doctrine'." 920 F.2d at 39.

The Court of Appeals did not rule that it would ignore actual harm to the defendants if no construction had occurred. Rather, it found no significant harm to defendants as well as no construction.

II. THE DECISION BELOW IS NOT IMPORTANT TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURT SYSTEM

In a burst of hyperbole, RF&P seeks to persuade this Court that the Court of Appeals decision "constitutes a dangerous invitation to citizens groups to paralyze Federal action by guerilla tactics." Pet. at 2. On the contrary, the decision below is highly fact specific, and those facts are unlikely to be repeated with any frequency, if at all. These peculiar facts led the Court of Appeals to reject the laches doctrine "under the circumstances this case presents." 920 F.2d at 40.

It is highly unusual for the Federal government to make a final decision and wait an extended period before implementation. The "circumstances" that caused a delay to occur here include a temperamental developer whose devotion to a controversial interchange design thwarted any possibility of development until 1984, an ambivalent National Park Service whose National Capitol Region went on record as favoring reacquisition of the easement, and a poor economic climate. These circumstances have foreclosed development of the interchange and the Potomac Greens site irrespective of the delay in filing suit.

III. RF&P WAS NOT PREJUDICED BY THE DELAY

In a confused discussion, RF&P attempts to demonstrate that it "could" be prejudiced if the exchange agreement is nullified. Pet. at 9-11. However, on analysis, these elements of supposed prejudice were not even accepted by the District Court, and for the most part will be caused, not by the delay in filing suit, but by the illegal exchange agreement.

First, RF&P claims it has expended "tremendous sums of money and incalculable time and energy" amounting to "millions of dollars." Pet at 9, 11. But as we have seen, both the District Court and the Court of Appeals found the expenditures attributable to the Society's delay to be less than $692,000 of a $500 million project, and therefore insufficient to constitute undue prejudice. 710 F.Supp. at 735; 920 F.2d at 39.

Second, RF&P claims that Dyke Marsh "is no longer developable." Pet. at 9. However, Dyke Marsh was not developable in 1971 or 1972 when the exchange agreement was signed. Fairchild, after a decade of trying, abandoned his attempts to develop the Marsh when he executed the exchange agreement in 1971.[7] In 1972, Congress enacted the Clean Water Act and its Section 404, 33 U.S.C. § 1344, which made it impossible to develop valuable wetlands such as Dyke Marsh. Thus, it was the

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[7] The marshy nature of the tract severely limited development options, the County opposed development and would not issue the necessary permits, the Park Service was also opposed, and there was no access to the adjacent Parkway. (App. at 62).

physical condition of Dyke Marsh and events in the 1960s and early 1970s that prevented and still prevents the development of Dyke Marsh, not the delay in filing suit.

Third, RF&P inexplicably suggests that the land exchange "is no longer open to revision. . . . " Pet. at 10-11.[8] No authority is cited, and it is unclear what this has to do with prejudice to RF&P. In any event, invalidation and recision of government action, including land transfers, is a traditional equitable remedy granted by the Federal courts. *Pan-American Petroleum & Transport Co. v. United States*, 273 U.S. 456 (1927).

At bottom, harm to RF&P from the invalidation of the land exchange cannot constitute prejudice to RF&P for laches purposes. For laches, the prejudice must be caused by the delay in filing suit. In other words, defendant must be harmed, not by the underlying cause of action, but by the delay. Thus, the traditional prejudice criteria – expenditures for development, loss of evidence, and substantial construction – may not occur if suit is timely filed. Here, however, the alleged harm to RF&P – invalidation of the land exchange agreement – would not be caused by the delay, but by the underlying illegality of the land exchange challenged in the lawsuit, whenever it was brought.

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[8] RF&P's argument suggests that the courts could not have invalidated the land exchange even if suit had been promptly brought because rights "irrevocably vested" in 1971. Pet. at 10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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July 10, 1991

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